Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

TADASHI DEMETRIUS KEYES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT DECLARING ERROR AND REVERSING OR REMANDING IN THAT THE UNITED STATES DISTRICT COURT COMMITTED ERROR IN NOT EITHER DISMISSING COUNT ONE, CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE 50 OR MORE GRAMS OF COCAINE BASE, FOR INSUFFICIENCY OF EVIDENCE TO PROVE A CONSPIRACY EXISTED OR FIND FOR THE DEFENDANT *NON OBSTANTE VEREDICTO*?

2. DID THE FOURTH CIRCUIT COURT OF APPEALS ERR BY NOT FINDING JUDICIAL ERROR BY THE DISTRICT COURT IN ACCEPTING THE VERDICT OF THE JURY AND NOT FINDING FOR THE DEFENDANT *NON OBSTANTE VEREDICTO* DUE TO A COMPLETE LACK OF SUFFICIENCY OF CREDIBLE EVIDENCE TO SUPPORT A VERDICT OF POSSESSION OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE IF REQUIRED HEREIN IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The caption of the case contains all the names of the parties involved in this matter. No corporation or parent corporation or subsidiaries exist in this litigation.

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The opinion and disposition by the Fourth Circuit Court of Appeals was not reported and is annexed hereto. (App. 1a.) The unpublished opinion was given the designation of 2006 U.S. App. LEXIS 2968, by Lexis, February 7, 2006. The denial of Appellant's Petition to Rehear is unpublished and is annexed hereto. (App. 10a.)

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the Appellant's PETITION TO REHEAR and thereby affirming the District Court's ruling in part and remanding in part was entered on March 28, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254, 1257, Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution. The appeal to the United States Court of Appeals for the Fourth Circuit was timely and duly filed in response to the judgment of the U. S. District Court of the Eastern District of Virginia on April 8, 2004. This Petition for a WRIT OF CERTIORARI is duly and timely filed within ninety (90) days of that date.

The United States District Court had correct jurisdiction in that the appellant was charged under United States statutes. Appellate jurisdiction existed with the Fourth Circuit Court of Appeals because the judgment of the District Court was final as to his conviction under all Counts of the indictment.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fine imposed nor cruel and unusual punishments inflicted.

2. This case involves the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital or otherwise infamous crime... nor be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

On January 16, 2003, Tadashi Demetrius Keyes, (hereinafter referred to as "Appellant" or "Mr. Keyes") was named in a two count Indictment returned by a Western District of Virginia Grand Jury in Charlottesville, Va. (P.S.R. p. 7.). A total of seven (7) individuals were named in the Indictment on a combined total of six counts. (P.S.R. p. 7.) Mr. Keyes was charged with Conspiracy to Possess with Intent to Distribute 50 or More Grams of Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and Possession of a Firearm During and in Relation to a Drug Trafficking Crime in violation of 18 U.S.C § 924(c)(1). (P.S.R. p. 7.)

Mr. Keyes pleaded not guilty and was tried along with two (2) co-defendants Gregory Antonio

Bates Felton and Todd Maurice Jones commencing on March 29, 2004. (P.S.R. p. 8.) On April 8, 2004, Mr. Keyes was found guilty, by a jury, on both Counts One and Four; Mr. Felton was found guilty on Counts One, Four and Five and Mr. Jones was found not guilty. (P.S.R. p. 8.)

A presentence report was ordered prepared and Mr. Keyes, through counsel, promptly filed two (2) sets of objections to the presentence report. (P.S.R. pgs. 20- 22). In pertinent part the objections to the presentence investigation report included: Objection to the drug weight determination of 1.5 kilograms of "crack" cocaine in connection with this (alleged) conspiracy which exceeded the jury finding of 50 grams in direct conflict with Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 124 S. Ct. 2531 (2004), forerunners of Booker. (Booker was not cited in the Objections but will be a basis for review in this appeal.) Objection to the enhancements to the base level offense due to the Michie homicide, for which Mr. Keyes was never charged nor convicted of any acts therein and the enhancement for obstruction of justice based on the same cited cases. Further objection to the enhancement of the level for obstruction of justice based on the fact that Mr. Keyes pleaded not guilty to these charges and never admitted being a part in this alleged drug conspiracy and never admitted possessing a firearm...the objection pointing out that the defendant was entitled to assert his innocence to these charges. (P.S.R. pgs. 20-22.)

The sentencing hearing was held before Judge Moon on August 30, 2004. The Court placed the

presentence report in the record of the case and stated that counsel on appeal shall be permitted access to the report. (S.T. p. 6.) Counsel for Mr. Keyes strongly objected at the sentencing hearing to those issues enumerated above in reference to the enhancements of base level. She argued that all the facts need to be found by the jury and the jury found only 50 grams of cocaine to be applicable to this defendant. As for the cross-reference to the murder of Gerald Michie, for which a co-defendant Mr. Felton was charged, she stated: "And, the homicide cross-reference...is totally out of proportion...we only have one person charged (Mr. Felton) and how fair and how reasonable is it to penalize other people for that action." (S.T. pgs. 7-9, 13.) The Court responded that if they are all in the "same conspiracy together" all or any could be equally guilty. (S.T. p. 14.)

Counsel for Mr. Keyes argued that a drug conspiracy had not been proven and would be raised on appeal. The Court accepted all of the enhancements and placed the offense level at 43 and the criminal history category at 2. The Government asked the Court to sentence by the guideline range of 43 and the Court agreed. (S.T. p. 14.)

Mr. Keyes was sentenced to a term of life plus 120 months...life under Count One and 120 months under Count Four, all to be served consecutively which he is now serving. (S.T. p. 21.) A Notice of Appeal was timely filed subsequent to the final order of the District Court. (Joint Appendix page showing Notice.)

The Fourth Circuit Court of Appeals decided the appeal on February 7, 2006, affirming in party and remanding in part, as to this Appellant. The Appellant argued that the District Court's application of the murder cross-reference, pursuant to the U.S. Sentencing Guidelines Manual ("USSG") § 2D1.1(d)(1)(2003) and the enhancement for obstruction of justice violated his Sixth Amendment rights because they were based on judicial fact-finding. Pursuant to United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court of Appeals found that the District Court erred in applying the murder cross-reference to the Appellant's sentence because the murder was not charged in the indictment or found by a jury beyond a reasonable doubt as to Keyes. The Court of Appeals also found that the enhancement for obstruction of justice was in error because it was based on judicial fact-finding.

The Court of Appeals found that these errors affected the Appellant's substantial rights because the sentence imposed by the District Court was longer than the term of imprisonment that the District Court could have imposed based solely on the jury's findings in view of, *inter alia*, United States v. Hughes, 401 F.3d 540, 548 (4th Cir. 2005).

The sentence was vacated and the case remanded for resentencing. Oral argument was dispensed with in that the Court of Appeals felt it would not aid the decisional process. A resentencing hearing has not been held in that the appeal process continues.

The guilty verdicts for the Counts for Conspiracy to Possess with Intent to Distribute 50 or More Grams of Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and 846 and Possession of a Firearm During and in Relation to a Drug Trafficking Crime in violation of 18 U.S.C § 924(c)(1), (P.S.R. p. 7.), were not disturbed and it is they that are the essence of this Petition for a Writ of *Certiorari*.

Appellant's Petition to Rehear was denied on March 28, 2006 and this Petition for a Writ of Certiorari duly and timely filed within ninety (90) days thereof.

STATEMENT OF THE FACTS

In the summer of 2002, a special task force, known as "JADA"... Jefferson Area Drug Enforcement Task Force... began an investigation of alleged illegal drug activity and distribution around and including the 800 Block of Estes Street, in Charlottesville, Virginia. The task force used video surveillance, audio recordings, confidential informants and witnesses to identify the most likely suspects controlling and participating in the alleged activity. (P.S.R. p. 8.)

Of the some seven (7) to twelve (12) indicted and unindicted suspects, it was alleged that Alonzo William Trice, aka "DoDo", was the main "crack" cocaine distributor in the immediate Estes area and that Marlon Daniel was the supplier to Trice. Further, the investigation alleged that Gregory Antonio Bates Felton, aka "Capone", Todd Maurice

Jones and the appellant herein, Tadashi Demetrius Keyes, aka "Calico", were alleged to be street level dealers working under the guidance of Trice. Grand Jury indictments were handed down and Felton, Jones and Mr. Keyes were tried by a jury together. (P.S.R. pgs. 8-11.) Alonzo Trice had pled guilty to Count One of the indictment pursuant to the terms of a written plea agreement. Marlon Daniel, who supplied Trice, under cross stated he had never sold drugs to Mr. Keyes. (T.T. Vol. III, p. 17.) Another witness, David Jones, under cross said he had never seen Mr. Keyes selling drugs. (T.T. Vol. III, pgs. 49-57.)

On September 14, 2002, in the very early morning hours, around 4:00 A.M., a 911 call was made to the Charlottesville police department stating that a shooting had occurred at an apartment located at 852 Estes Street. When the police arrived, they found Gerald Michie slumped on the floor having been shot three (3) times. He was taken to the hospital but died in a few days. Gregory Felton was charged with the shooting of Gerald Michie. It was alleged by the Government that the motive for the shooting of Gerald Michie by Mr. Felton was the suspicion that Michie had stolen some guns from Mr. Felton. (T.T. Vol. I, pg. 111-116.)

Witnesses testified in reference to the shooting. The apartment the shooting occurred in belonged to Rick Witcher and Gerald Michie had been staying with him. Witcher testified that he saw Mr. Felton shoot Michie three (3) times and that the shooting concerned the belief by Mr. Felton that Michie had stolen some of his guns. (T.T. Vol. III, p.

221.) Mr. Felton at all times has stated that he did not kill Michie but that Mr. Trice had killed him. (T.T. Vol. VI, p. 186.) Melvin Bishop, a forensic death investigator testified that there was no physical evidence showing Mr. Keyes was present in the apartment. (T.T. Vol. III, p. 61.)

There were a lot of people in the apartment, several men and two (2) women...a party atmosphere had existed prior to the shooting in the early morning hours, around 4:00 AM. (T.T. April 7, 2004, p. 127.) Testimony as to whether or not Mr. Keyes was present in the room of the shooting was in conflict...one witness stating he was asleep in a chair and another saying he did not see him in the room. (T.T. Vol. IV, p. 51.) No evidence attached Mr. Keyes to the shooting death of Michie. No witness gave any testimony that associated Mr. Keyes with the killing of Michie. No witness gave testimony that Mr. Keyes had ever threatened Michie with violence from Mr. Felton or himself.

It was alleged that Mr. Keyes had shot Donny Cimburke in the arm and the Government made the case that this shooting was connected to the alleged drug conspiracy. This was the Government's linchpin to proving Count Four against Mr. Keyes. Cimburke, who is a white male, testified that he drove into the drug area attempting to buy drugs, as he had previously done. The Government alleged that Mr. Keyes shot into the truck hitting Cimburke because he thought Cimburke was a police informer. This theory was not supported by any testimony or other evidence. The Government alleged that the alleged shooting of Cimburke showed Mr. Keyes was

an "enforcer" for the drug business. Cimburke testified that he had never had any dealings with Mr. Keyes and that several hundred dollars had been stolen from him during the attack. (T.T. Vol. IV, pgs. 202-230.) A photo line-up had been shown to Cimburke subsequent to his being shot at which time he chose the photo of Mr. Keyes. (T.T. Vol. IV, p. 245.) Mr. Keyes was never charged in Federal Court with the shooting of Cimburke any alleged shooting of any person is not part of the indictment under which the appellant was found guilty. A Motion in Limine by counsel for Mr. Keyes was granted by the Court which precluded the Government from mentioning collateral charges that may have been placed against Mr. Keyes in the state courts. (T.T. Vol. I, p. 100.) The shooting of Cimburke was the basis of the Governments charge of using a firearm in furtherance of a drug trafficking crime but counsel for Mr. Keyes advanced the theory that the shooting was nothing more and nothing less than a robbery.

Witnesses testified that they had seen Mr. Keyes with drugs but there was no evidence offered whatsoever that he sold drugs. There was no evidence offered proving what quantity of drugs Mr. Keyes had possessed. At sentencing the Government even said, " Now, granted there was no evidence at trial that proved that even 50 grams went through Mr. Keyes' hands. There was no testimony from witnesses who had Mr. Keyes selling." (S.T. p. 10.) Witness Michelle Jones, aka "Shelly", said Mr. Keyes "hung out" with Mr. Felton but never sold drugs to her knowledge. (T.T. Vol. IV, pgs. 81-83.)

The gravamen of the Government's case was that a theory of conspiracy would tie all the defendants into the alleged crimes of any of the defendants including the murder of Michie. The Government referred to the conspiracy as a "family business" which was enforced with violence. (T.T. April 7, 2004, pg. 107.) In arguing the conspiracy theory of guilt to the jury, the Government stated "...all a conspiracy is...is a group of people who form an agreement to get something done". (T.T. April 7, 2004, p. 111.)

The Government used the surveillance camera videos to prove their conspiracy theory but Mr. Keyes was not in any of the videos. (T.T. April 7, 2004 p.205.) The Government told the jury that even if Mr. Keyes had never touched any drugs he was still guilty of drug conspiracy due to his alleged commission of acts of violence to allegedly support the drug business. (T.T. April 7, 2004 p. 119.) No gun was ever found that was connected to Mr. Keyes. (T.T. April 7, 2004 p. 114.)

Everything in the case against Mr. Keyes flowed from the conspiracy count. The Government summed up its theory of Mr. Keyes guilt and connection to the alleged conspiracy by stating the motive for Mr. Keyes alleged shooting of Donnie Cimburke was because Cimburke was "bad for business". (TT. April 7, 2204 p. 149.). Counsel for the defendant reminded the jury that "a person who had no knowledge of the conspiracy but who happens to act in a way that advances some object or purpose of a conspiracy does not thereby become a conspirator". She continued to remind the jury that

even with many, many hours of surveillance tape of the alleged conspirators made by the Government, Mr. Keyes was never among those in the tape ergo no direct evidence that he was part of this or any conspiracy. (T.T. April 7, 2004, p. 209.)

Mr. Felton, according to his attorney, had acknowledged a conspiracy from day one on Ninth and Estes Street to sell drugs. (T.T. April 7, 2004, p. 158.) No testimony was heard that Mr. Keyes was part of that conspiracy from Felton or Trice or Jackson or others. Counsel for Mr. Keyes reminded the jury that there was evidence to show there was a conspiracy to sell drugs between other defendants indicted and unindicted...but that did not mean Mr. Keyes was part of the conspiracy. The second and third elements of a conspiracy conviction against Mr. Keyes were missing counsel told the jury, to wit: Did the defendant know there was a conspiracy? Did the defendant knowingly and voluntarily become a part of the conspiracy. Counsel for Mr. Keyes apprised the jury of the specific jury instructions they would be receiving that directly impacted whether Mr. Keyes could be found guilty beyond a reasonable doubt under Count One and Count Four. (T.T. April 7, 2004, p. 232.)

In a standard charge to the jury prior to their deliberation, Judge Moon reminded them that in weighing the testimony of a witness they should consider his relationship to the Government or to the defendant and his interest if any in the outcome of the case...among other factors...and reminded them of the Government's burden of proving guilt beyond a reasonable doubt. (Jury Instructions, p. 5.)

Judge Moon advised the jury that by its very nature a conspiracy is clandestine and covert and frequently resulting in little direct evidence of such an agreement and may therefore be proven by circumstantial evidence. The jury instructions were lengthy and Judge Moon instructed at length in reference to Count One and Count Four of the indictment.

Salient among the instructions was in reference to Number Six: That it was part of the conspiracy that some members including Mr. Keyes would use various firearms to "protect and facilitate their illegal narcotics trafficking activities". (Jury Instructions p. 14.)

Judge Moon instructed on the elements of conspiracy to violate federal drug laws that must be proven beyond a reasonable doubt, to wit: 1. There was an agreement between two or more persons to engage in conduct that violates a federal drug law. 2. That the defendant knew of the conspiracy. 3. That the defendant knowingly and voluntarily became a part of the conspiracy. (Jury Instructions p. 15.)

Judge Moon advised the jury that to find the defendant guilty of Count Four...knowingly possess a firearm in furtherance of a drug trafficking crime...first they must find him guilty of Count One...conspiracy. (Jury Instruction p. 23.) Mr. Keyes was found guilty by the jury under Counts One and Four and sentencing was conducted as described above, on August 30, 2004.

REASON FOR GRANTING THE WRIT

1. Exceptional Constitutional questions warrant Certiorari.

SUMMARY OF ARGUMENT

No evidence either implied or explicit was heard that any agreement existed between the appellant, Mr. Keyes and any of the co-defendants, co-conspirators or anyone to create a CONSPIRACY TO SELL DRUGS. There was absolutely no evidence either real or circumstantial that the defendant ever conspired to sell drugs with anyone. The testimony the Government depended on from such redoubtable witnesses as Trice and Jackson was in no way sufficient to carry the burden of proof under the Counts charged, both drug and firearm charges.

If no conspiracy existed and was not proven, the appellant's indictment and count of gun possession in furtherance of the conspiracy is without merit and should be *void ab initio.*

ARGUMENT

A CONSPIRACY is an AGREEMENT. A CONSPIRACY must have an AGREEMENT. Not one witness, no matter how much leniency the Government had given or promised them in their own sentencing ranges, ever testified that this Appellant ever agreed at any time or place with one of them or with anyone to sell drugs. The firearm

charge stems from the alleged conspiracy and if there was no conspiracy the firearm charge is moot.

STANDARD OF REVIEW

The strict standard of being clearly erroneous prevails in this appeal as to the evidence being insufficient for a finding of guilty beyond a reasonable doubt. This Court reviews a lower court's legal conclusions *de novo;* factual determinations are reviewed under a clearly erroneous standard. United States v. Rusher, 966 F.2d 868 (4th Cir.), *cert denied*, 506 U.S. 926 (1992).

I. THE DISTRICT COURT COMMITTED ERROR IN NOT EITHER DISMISSING COUNT ONE, CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE 50 OR MORE GRAMS OF COCAINE BASE, FOR INSUFFICIENCY OF EVIDENCE TO PROVE A CONSPIRACY EXISTED OR FIND FOR THE DEFENDANT *NON OBSTANTE VEREDICTO.*

Your Appellant challenges his conviction under the conspiracy count. This issue is outlined in the FACTS section of this brief and those FACTS literally speak for the issue. No physical evidence, no laboratory findings, no drugs, no photos, no tapes, no confession and no testimony from any witness that Mr. Keyes was in a drug conspiracy with the co-defendants to sell drugs. Mere presence at the scene or the fact of association or the similarity of conduct among various persons and may have assembled

together discussing common aims and interests does not establish proof of the existence of a conspiracy which by definition requires an agreement by parties to commit a criminal act...in this case to violate a federal drug law.

This appeal contends the evidence did not establish a conspiracy involving Mr. Keyes to sell and distribute drugs, but only a collection of relationships between and among this appellant and the others indicted by the Grand Jury. For arguendo purposes only, if the jury were to find the evidence did establish a conspiracy, it was a series of independent conspiracies and not the conspiracy alleged in the indictment...among all of the alleged co-defendants.

Not one of the witnesses testified that they had an "agreement" to sell drugs with the defendant Mr. Keyes. Not one said he conspired to sell drugs with the defendant Mr. Keyes.

A jury verdict must be upheld if there exists substantial evidence to support it, viewing the evidence in the light most favorable to the government. Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

The evidence, at most, showed that all of those indicted bought and used drugs and that some sold drugs, but failed to show that this appellant worked

together with anyone or made any agreements in that regard. To sustain its burden, the Government must show that a conspiracy existed, that appellant knew it existed, and that they knowingly entered into it. United States v. Cropp, 127 F.3d 354, 361 (4th Cir. 1997). Not even one of the witnesses testified that any such agreement was ever made and that they (the witnesses) were never aware at any time of any conspiracy existing that included Mr. Keyes.

This Court has set forth what the government must prove in a drug conspiracy charge, to wit:

> "1. An agreement to possess with intent to distribute the controlled substance named in the indictment existed between two or more persons. 2. That the defendant knew of the conspiracy. 3. That the defendant knowingly and voluntarily became a part of the conspiracy."

United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) (en banc).

The only evidence presented at trial concerning Mr. Keyes involvement with drugs was testimony that he had been seen in possession of drugs. Not only was there no evidence showing he sold drugs but also there was no evidence that he had any agreement to distribute with anyone or that he knew of this or any conspiracy or that he knowingly and voluntarily became a part of this or any conspiracy to distribute illegal drugs.

Therefore, this Court should vacate the verdict as to Count One that finds the appellant guilty of conspiracy to distribute or possess with the intent to distribute 50 or more grams of crack cocaine. He was seen with the co-defendants and those indicted in social situations...they all lived in the same area. He was never seen by a witness or by Government surveillance selling or distributing or receiving drugs. He was seen by witnesses possessing drugs. This without more does not prove a conspiracy. The Government must prove, under 21 U.S.C. § 841 (2000), an agreement existed to violate a federal drug law and that the defendant had knowledge of the conspiracy and that the defendant was a willing participant. United States v. Strickland, 245 F.3d 368 (4th Cir. 2001). This burden was not met by the Government. A defendant must "willfully" join in a conspiracy plan to be convicted under § 841. Burgos, *supra*.

There was not sufficient evidence presented by the Government to permit a jury to reasonably infer that this Appellant was in the drug trafficking conspiracy that co-defendants had admitted to but had never implicated this Appellant even to enhance their own position with their respective indictments.

II. THE DISTRICT COURT COMMITTED ERROR IN NOT EITHER DISMISSING COUNT FOUR, POSSESSION OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME FOR INSUFFICIENCY OF EVIDENCE TO SUPPORT A VERDICT OR FIND FOR THE DEFENDANT *NON OBSTANTE VEREDICTO.*

Your Appellant challenges his conviction under the firearm's count. A proven drug trafficking conspiracy is an essential element of the offense charged against Mr. Keyes in Count Four. This appeal suggests to this Court that such a conspiracy was not proven and without same this Count too must be vacated. *See*, Rodriquez-Moreno, 526 U.S. 275, 143 L. Ed. 2d 388, 119 S. Ct. 1239 (1999).

As stated *supra*, the alleged shooting of Cimburke was the Government's linchpin for prosecution under Count Four. Important and essential items are, however, missing from the Government's case: The alleged gun was never produced. No witness substantiated the Government's claim that Mr. Keyes had shot Cimburke in furtherance of an alleged drug conspiracy. The only "proof" the Government had was the victim's identification of Mr. Keyes from a photo line-up. Cimburke testified he was also robbed in the attack. Purely for arguendo purposes, if Mr. Keyes had shot and robbed Cimburke the crime would have been simply an armed robbery and not the use or possession of a firearm during and in relation to drug trafficking. An additional fact is

that Cimburke did not know Mr. Keyes nor had he ever dealt with him previously notwithstanding the fact that Cimburke was a frequent visitor to the "drug marketplace". This lends credence to the defendant not being a part of the conspiracy to sell drugs in this neighborhood.

Count Four alleged a violation of 18 U.S.C. § 924(c)(1) which requires the government to prove beyond a reasonable doubt, the following, to wit: 1. That the defendant used, carried or possessed in furtherance of the alleged crime, a firearm. 2. That this occurred during and in relation to the alleged drug trafficking conspiracy. *See*, United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002). Essential to the Government's case must be the presenting of evidence indicating that the possession of a firearm furthered, advanced or helped forward a drug trafficking crime. *Id.* Additionally, this count is dependent on a conspiracy having been proven beyond a reasonable doubt. That burden was not met by the Government.

As stated, the Government's theory was that the shooting of Cimburke was due to Mr. Keyes and others thinking Cimburke was a police plant and a danger to their business. Actually, a shooting of Cimburke or anyone driving through the drug selling and dealing area would bring unwanted police scrutiny and publicity. It is therefore incredible to believe that Mr. Keyes shot Cimburke in furtherance of some alleged drug conspiracy and therefore Count Four must also be vacated.

No physical evidence...no finger prints, no laboratory findings, no drugs, no photos, no tapes, no confession. Not one single witness claimed an agreement had been made with them or with anyone to sell drugs.

Your appellant argues that the evidence, at most, showed that they all bought and used drugs and that some sold drugs, but failed to show that they worked together or made any agreements in that regard. To sustain its burden, the Government must show that a conspiracy existed, that the Appellant knew it existed, and that he knowingly entered into it. United States v. Cropp, 127 F.3d 354, 361 (4th Cir. 1997). Not even one of the witnesses testified that any such agreement was ever made with this Appellant.

The firearm's statute, 18 U.S.C. § 924(c)(1), under which the Appellant was convicted states in relevant part:

> Any person who, during and in relation to any crime of violence or drug trafficking crime...for which the person may be prosecuted in a court of the United States, uses or carries a firearm or who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime...be sentenced to a term of imprisonment of not less than 5 years.

The statute makes clear that in order to obtain a conviction, the Government must offer

direct proof that the defendant used or carried the firearm "during and in relation to any...drug trafficking crime". It is the relationship between the gun and drug trafficking that criminalizes the gun's us or possession. This law only prohibits or restricts conduct relating to narcotic drugs. When applying this standard to the facts of this case it is clear that the Government failed to make out this requisite relationship to the jury and thus the evidence was insufficient to find this Appellant guilty beyond a reasonable doubt under the firearm's count.

CONCLUSION

For a totality of reasons as outlined above, your appellant respectfully asks this Honorable Court to grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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